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IN THE

# SUPREME COURT

OF THE

# UNITED STATES

October Term, 1929.

Number 412.

MARI TOLLEFSEN TODOK AND KNUTE C. ENGEN, PETITIONERS,

V.

UNION STATE BANK OF HARVARD, NEBRASKA, A CORPORATION; LEROY A. MEGRUE AND BERTHA M. MEGRUE, ROBERT E. BROWN AND ANNA S. BROWN, H. G. THOMAS, ADMINISTRATOR OF THE ESTATE OF CHRISTIAN KNUDSON, DECEASED; THEODORE GRIESS, VAN E. PETERSON, AS RECEIVER OF THE UNION STATE BANK OF HARVARD, NEBRASKA; NEBRASKA STATE BANK OF HARVARD, NEBRASKA, AND THE FIRST TRUST COMPANY OF LINCOLN, NEBRASKA, RESPONDENTS.

## BRIEF OF RESPONDENTS IN OPPOSITION TO WRIT OF CERTIORARI.

WALTER D. JAMES,
B. F. BUTLER,
J. H. GROSVENOR,
EARL CLINE,
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(34,543)

The petition for a writ of certiorari seeks to review a judgment of the Supreme Court of Nebraska, holding

that under Section 6 of the Treaty of Amity and Commerce with the Kingdoms of Sweden and Norway of 1783, a subject of Norway, resident of Nebraska from 1878, in 1923 could not convey Nebraska land without the joinder of his wife from whom he had been separated since 1869, and who remained a subject and resident of Norway.

The precise holding of the Nebraska court was, that Section 2819, Comp. St. Neb., providing that "the homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife, if otherwise applicable, is inconsistent with Section 6 of the treaty."

It is submitted that under Rule 35 the writ of certiorari should not be granted as there is no special or important reason therefor.

I.

The construction given state statutes by the highest court of the state will, as a general rule, be followed by the Supreme Court in determining the jurisdiction to consider a case on the ground that a federal right is involved. *Bacous* v. *La.*, 232 U. S. 334, 58 L. Ed. 627. A decision of the highest court of a state fixes the meaning of state legislation, as though such meaning had been specifically expressed therein.

*Knights of Pythias* v. *Meyers*, 265 U. S. 31, 68 L. Ed. 891.

The contention of the petitioners, if sustained, would operate to deny rights granted by the treaty, even under the narrow construction contended for.

Assuming, for the present, that Section 6 of the treaty gives a subject of Norway no greater right in the dis-

position of his Nebraska real estate than a citizen of Nebraska, under former decisions of the Nebraska Supreme Court which have not been modified or overruled, a citizen of Nebraska, under the circumstances of the case at bar, could dispose of his real estate or so-called homestead without the joinder of his non-resident wife.

Section 1224, Comp. St. Neb. 1922, provides:

> "*The right of a married man or woman to inherit a part or all of the real estate of which his or her spouse was seized of an estate of inheritance at any time during the marriage,* may be barred by a conveyance executed by such husband and wife while residents of this state, and, *if either such husband or wife be not a resident of this state, by a deed of conveyance executed either by both of said parties or by the one seized at the time of such conveyance;* and such right to inherit may also be barred by the sale of such real estate under execution or other judicial sale, during the lifetime of the owner of the title."

The statute has been repeatedly upheld in Nebraska.

*Atkins* v. *Atkins*, 18 Neb. 474.
*Minor* v. *Morgan*, 83 Neb. 400.
*Kiser* v. *Sullivan*, 106 Neb. 454.

And see

*Buffington* v. *Grosvenor*, 46 Kan. 730, 27 Pac. 139.
*Ferry* v. *Spokane Ry. Co.*, 268 Fed. (9 C. C. A.) 117. Affirmed, 258 U. S. 314, 66 L. Ed. 635.

In *Cunningham* v. *Marshall*, 94 Neb. 302, the Nebraska Supreme Court held that a resident of Nebraska could convey the place on which he was residing without the joinder of his wife, who was and had been a resident of the state of New York.

The opinion is brief:

> "This is a suit in equity to establish homestead rights in 240 acres of land in Lancaster County. The trial court dismissed the case after a full hearing, and plaintiffs have appealed.
>
> "Felix Cunningham, a married man, held the legal title to the land, and, describing himself as a single man, deeded it to Frank McKelvie, May 5, 1897. For full value the latter deeded the land to Joseph H. Marshall, who willed it to defendant, his wife. He died June 15, 1907. Felix Cunningham is dead. Four of his five children are plaintiffs. His wife was divorced, and is not a party to this action. During the time covered by the asserted acquisition and occupancy of the homestead pleaded, the wife and all of the children, except the oldest son, lived in New York, and never saw the premises in controversy. A fair interpretation of all of the evidence leads inevitably to the conclusion that neither the father nor his oldest son ever acquired, occupied or claimed, when in possession, a homestead in the land, within the meaning of the homestead law. An analysis of the evidence upon which this conclusion rests would neither benefit the parties nor make an addition to the law, and will not be attempted. For failure to establish this material fact, the case of plaintiffs entirely fails. The decree conforms not only to the law, but to the demands of equity."

To require the joinder of petitioner, a resident subject of Norway, in a conveyance by a Norwegian subject, resident of Nebraska, would be to discriminate against the treaty rights, even if petitioner's construction of the treaty were granted—that the treaty merely prohibits discriminatory legislation.

It is to be noted that the fact that the grantor described himself as single was immaterial and created no estoppel.

*France* v. *Bell*, 52 Neb. 47.
*Giles* v. *Miller*, 36 Neb. 346.
*Whitlock* v. *Garson*, 35 Neb. 829.

II.

The Nebraska Supreme Court properly construed the treaty as giving a Norwegian subject the right to freely dispose of his goods and effects.

It is not the rule that a treaty must be construed so as to avoid conflict with a state statute.

Petitioner contends, "where a treaty might be construed in different ways, a liberal fair construction which will leave unchanged state statutes is to be preferred," and cites in support thereof, *Hauenstein* v. *Lyndham*, 100 U. S. 483, which, in fact, holds:

> "Where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it, and the other liberal, the latter is to be preferred. *Shanks* v. *Dupoint*, 3 Pet. 242. Such is the settled rule in this court."

Recent decisions adhere to this statement.

*Jordan* v. *Lashiro*, 73 L. Ed. 36.
*Nielsen* v. *Johnson*, 73 L. Ed. 221.

In the latter case, the rule is declared to be:

> "As the treaty making power is independent of and superior to the legislative power of the states, the meaning of the treaty provisions so construed is not restricted by any necessity of avoiding possible conflict with state legislation, and when so ascertained must prevail over inconsistent state enactments.

> "When a treaty provision fairly admits of two constructions, one restricting, the other enlarging the right which may be claimed under it, the more liberal interpretation is to be preferred."

When the treaty of 1783 was adopted, homestead laws were unknown. They were unknown at common law. 29 C. J. 782. The first homestead law seems to have been enacted in 1839. 29 C. J. 782.

An alien, then, had no right to hold or dispose of real property.

> "Each state in the absence of any treaty provision to the contrary, has power to deny to aliens the right to own land within its borders."
>
> *Terrace* v. *Thompson*, 263 U. S. 197, 68 L. Ed. 255.

But such right was granted by the treaty with Norway and Sweden. Included, was the right to "freely dispose of their goods and effects either by testament, donation or otherwise in favor of such persons as they think proper." The treaty, and not the state law, furnishes the authority for the Norwegian subject to hold and dispose of Nebraska lands.

> "That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations, is clear. It is also clear that the protection which should be afforded to the citizen of one country owning property in another, and the manner in which that property may be transferred, devised or inherited, are fitting subjects for such negotiations, and of regulation by mutual stipulations between the two countries."
>
> *DeGeofroy* v. *Riggs*, 133 U. S. 258, 33 L. Ed. 642.

The Nebraska statutes do, in general, discriminate against aliens (Comp. Statutes of Nebraska, Secs. 5686-5690),

but do not apply here because title was acquired prior to their enactment. Reference to such anti-alien land laws is here made to emphasize the point that the rights are determined by the treaty.

In this connection it is proper to call attention to the fact that in quoting the Nebraska Constitution of 1875 (brief, page 20) petitioner misquotes by omitting the word "resident" preceding the word "aliens." Section 25, Article 1 of the Constitution of 1875, provides:

> "No distinction shall ever be made by law between resident aliens and citizens in reference to the possession, enjoyment or descent of property."

In 1920 this was amended to read:

> "There shall be no discrimination between citizens of the United States in respect to the acquisition, ownership, possession, enjoyment or descent of property. The right of aliens in respect to the acquisition, enjoyment and descent of property may be regulated by law."

The case of *People* v. *McClay*, 2 Neb. 9, holding that exemptions applied to aliens, did not involve land or any treaty rights.

Petitioner's argument that Section 6 of the treaty merely prohibits discriminating restrictions is based on the erroneous principle of construction that a treaty must be construed so as to avoid conflict with state law.

Some treaties expressly limit the rights of aliens to those possessed by citizens of the respective states. This was true, for example, of the treaty with Great Britain of 1794. *Hughes* v. *Edwards*, 4 Wheat. 489; the Treaty with France; *Bihaud* v. *Bize*, 105 Fed. 485; Treaty of 1911 with Japan in *Asakura* v. *Seattle*, 265 U. S. 332, 68

L. Ed. 1041; Treaty with Wurtemberg; *Frederickson* v. *Louisana*, 23 How. 445, 16 L. Ed. 577.

While there are statements in opinions to the effect that the treaty merely grants to subjects of Norway and Sweden equal rights with citizens, there is no actual decision to that effect. Statements in an opinion, are, of course, limited to the issues involved.

*German Alliance Ins. Co.* v. *Home Water Supply Co.*, 226 U. S. 219, 57 L. Ed. 195.

Thus, the quotation from *Peterson* v. *Iowa*, 245 U. S. 170 (brief, p. 22), must be read in the light of the point actually decided. The question decided in that case was whether the treaty with Sweden applied to benefit of Swedish heirs of a citizen of the United States. The decision was that the treaty dealt with the rights of subjects of Sweden owning land in the United States, and not with the rights of Swedish subjects to inherit land from a citizen of the United States.

The case of *Stizrud* v. *State*, 58 Wash. 339, likewise involved the right of a subject of Norway to inherit from a citizen of the United States. The decision determined the validity of an inheritance tax imposed at a higher rate upon non-resident alien heirs than was imposed upon citizens or resident aliens. On the erroneous theory that the treaty applied, the court held the tax to be invalid. It was not necessary to determine whether the treaty was confined to protecting against discriminating legislation. The court's theory that the treaty protected the rights of Norway subjects to inherit from a citizen of the United States was rejected by this Court in *Duus* v. *Brown*, 245 U. S. 174, 62 L. Ed. 228.

Nor is it necessary to consider the fears expressed by petitioner's brief (page 22), concerning the effect of the

interpretation of Section 6 of the treaty by the Nebraska Supreme Court.

The right to freely dispose of property may be made to comply with forms imposed by state law; but the right to freely dispose of property would be unduly restricted by a statute requiring a resident of a foreign country to join in the conveyance. It was for this purpose that Section 1224, Compiled Statutes of Nebraska (quoted, supra, p. 3) was enacted.

Construing a similar statute, the Supreme Court of Kansas said:

> "For reasons that were deemed sufficient, the legislature made the signature and conveyance of the non-resident wife unnecessary. The fact that the wife did not accompany her husband to Kansas, or had abandoned him and gone to another state, and may or may not have obtained a divorce elsewhere, thus leaving the status of the parties in doubt, and making it difficult to obtain a perfect transfer of land in many cases, may have been deemed sufficient reason for prescribing this rule of conveyance. The statute was enacted shortly after the admission of the state, and when it was rapidly increasing in population, through immigration from many of the eastern states and also foreign countries, many coming without their wives and families; and possibly the rule was adopted to avoid inconvenience and deception of the transfer of real property. * * * Although the estate of dower has been abolished in Kansas, the contingent interest of the wife in the real property of the husband is similar to dower in its inchoate stage; at least, it is substantially similar, as far as the validity of such a provision as we are considering is concerned."
>
> *Buffington* v. *Grosvenor*, 46 Kan. 730, 27 Pac. 139.

Section 6 of the treaty fairly admits of the construction placed thereon by the Nebraska Supreme Court.

At the time the treaty was adopted in 1783, it may have been considered essential to provide in the treaty not only that there should be no discrimination in respect to the disposition of property by aliens residing in the respective countries, but to grant aliens the right to dispose of property regardless of all local restrictions. There were then thirteen colonies or states, on the one hand; one kingdom, that of Norway and Sweden, on the other.

By treaty it was provided that citizens of the United States owning property in Sweden and Norway might "freely dispose of their goods and effects either by testament, donation or otherwise in favor of such persons as they think proper."

But, as contended by petitioner, subjects of Norway or Sweden owning land in the United States might "freely dispose of their goods and effects either by testament, donation or otherwise in favor of such persons as they think proper," provided the respective colonies granted to their citizens the right to dispose of property by will; and also subject only to any and all restrictions of every nature imposed by the respective colonies on their own citizens.

It has been declared that the right to dispose of property by will is wholly statutory and could be entirely denied by the state.

*Dawson* v. *Godfrey,* 4 Cranch. 321, 2 L. Ed. 634.
*Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283, 42 L. Ed. 1037.
See note, 9 L. R. A. (N. S.) 121.

Under section 6 of the treaty, may the state of California deny to a subject of Norway or Sweden, owning property in that state, the right to dispose of the same by will? If petitioner's contention of the treaty is correct, that could be done if such right was denied to a citizen of California. While the Constitutions of California and of the United States may not confer upon citizens of California the fundamental right of disposing of their property by will, the treaty, which is the fundamental law, does confer upon subjects of Norway and Sweden the right to "freely dispose of their goods and effects either by testament, donation or otherwise in favor of such persons as they think proper."

III.

The assignment that "the decision of the Supreme Court of Nebraska so construes the treaty with Norway that petitioners are deprived of their property without due process of law" will not sustain the writ of certiorari.

The Fifth Amendment, cited by petitioners, does not apply to the states.

*Barron* v. *Mayor,* 7 Peters. 242, 8 L. Ed. 672.

Nor would a claim that the petitioners are deprived of their property without due process of law, contrary to the Fourteenth Amendment, be of merit.

*Ferry* v. *Spokane, P. & S. Ry. Co.,* 258 U. S. 315, 66 L. Ed. 635.

The argument of petitioners, on analysis, is a reiteration of their contention that the court erred in construing the treaty. An erroneous decision cannot be treated as a deprivation of property without due process of law.

*Bonner* v. *Gorman,* 213 U. S. 86, 53 L. Ed. 709.

*Central Land Co.* v. *Laidley,* 159 U. S. 112, 40 L. Ed. 94.

IV.

The decision does not deny petitioners the equal protection of the laws.

Petitioner, Mari Tollefsen Todak, is an alien, subject of Norway and non-resident of Nebraska and the United States.

Knute C. Engen was alien-born (Rec. 50; Rec. 75), and his alienage is presumed to continue.

2 C. J. 1045.

*Hauenstein* v. *Lyndham,* 100 U. S. 483.

He is not a resident of Nebraska (brief, p. 2).

The equal protection of the laws does not apply to persons not within the jurisdiction of the state. The Fourteenth Amendment reads:

> "Nor deny to any person within its jurisdiction the equal protection of the laws."
>
> 12 C. J. 1142.

The state could discriminate against the non-resident wife.

*Ferry* v. *Spokane, P. & S. Ry. Co.,* 258 U. S. 314, 66 L. E. 635.

*Miner* v. *Morgan,* 83 Neb. 400.

This assignment will not sustain the issuance of the writ of certiorari.

It is respectfully submitted that the writ of certiorari should not be granted.

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